

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
FIRST REGION**

In the Matter of

FIRST STUDENT, INC.

Employer<sup>1</sup>

and

INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS, DISTRICT LODGE 15, AFL-  
CIO

Petitioner

Case 1-RC-22406

**DECISION AND DIRECTION OF ELECTION<sup>2</sup>**

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<sup>1</sup> The name of the Employer appears as amended at the hearing. I also take administrative notice that, on December 9, 2009, the Employer entered into a stipulation in a recent case, *First Student, Inc.*, Case 1-RC-22391, in which the the name of the Employer reads as corrected above.

<sup>2</sup> Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board. In accordance with the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director.

Upon the entire record in this proceeding, I find that: 1) the hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed; 2) the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this matter; 3) the labor organization involved claims to represent certain employees of the Employer; and 4) a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

With respect to commerce, I again take administrative notice of the Employer's stipulation in *First Student, Inc.*, Case 1-RC-22391, in which the Employer recently stipulated that it is an employer engaged in commerce and also stipulated to the necessary commerce facts.

The Petitioner seeks to represent a unit of technicians, technician fuelers, lot attendants, and a technician in charge who are employed at the Employer's Marlborough, Massachusetts facility. The Employer did not appear at the hearing. At the hearing, the Hearing Officer noted that, in pre-hearing discussions with a Board agent, the Employer took the position that the technician in charge should be excluded from the unit as a statutory supervisor. The Petitioner, who did appear at the hearing, took the position that the technician in charge is a nonsupervisory employee and presented testimony in support of its position.<sup>3</sup> I find that the technician in charge is a nonsupervisory employee and shall include him in the unit.

The Board's duty to ensure due process for the parties in the conduct of Board proceedings requires that the Board provide parties with the opportunity to present evidence and advance arguments concerning the relevant issues. However, the Board also has an affirmative duty to protect the integrity of the Board's processes against unwarranted burdening of the record and unnecessary delay. *Bennett Industries, Inc.*<sup>4</sup> When the employer refused to take a position on certain employees' supervisory status in *Bennett Industries*, the Board found that the hearing officer properly refused to allow the employer to introduce evidence on that issue. Thus, the presumption of employee status was unrebutted, because the burden of proving supervisory status lies with the party asserting such status. In refusing to take a position, the employer in *Bennett Industries* thereby failed to meet its burden of proof. The Board found that there was no need to take record evidence on the issue, and that the Regional Director's conclusion that the petitioned-for employees were presumed to be statutory employees, in the absence of affirmative evidence to the contrary, was correct. *Allen Health Care Services*.<sup>5</sup> By extension, I find that, here, where the Employer failed to take an on-the-record position that the technician in charge is a statutory supervisor or even to appear at the hearing, the presumptive employee status of the technician in charge was unrebutted without the need for any record evidence on the issue.

I find, nonetheless, based on the unrebutted testimony of Technician in Charge Michael Sullivan and Technician Sean Merchant, that the technician in charge is a nonsupervisory employee.

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With respect to the labor organization status, I note that, at the hearing, the Petitioner stipulated to its status as a labor organization and that the Board has found the Petitioner to be a labor organization in several prior cases. See, *Last Radio Group Corp.*, 327 NLRB 405, 406 (1998); *N.R. Automotive, Inc.*, 318 NLRB 168, 168 (1995); *Acme Bus Corp.*, 317 NLRB 887, 888 (1995).

<sup>3</sup> The Petitioner is willing to go to an election in any unit found appropriate.

<sup>4</sup> 313 NLRB 1363 (1994).

<sup>5</sup> 332 NLRB 1308 (2000).

It appears from the stipulation in Case 1-RC-22391 that the Employer is engaged in the business of providing school bus transportation services. Employees at the Marlborough, Massachusetts facility at issue repair the Employer's school buses. Technician in Charge Michael Sullivan, whose position is at issue, reports to Marlborough Service Manager Jeff Schumacher, who reports, in turn, to Regional Maintenance Manager Ed Tikonoff.<sup>6</sup>

Technician in Charge Sullivan and various other technicians, repair the school buses either at the Marlborough facility or out on the road.<sup>7</sup> Sullivan is more highly skilled than the other technicians and has higher-level certifications.<sup>8</sup> He spends about six hours per day working on the buses with his tools, either in one of the six bays at the facility or on the road.<sup>9</sup> Sullivan and the technicians all enter work orders into a computerized vehicle management system. Sullivan has access to the technicians' files in the vehicle management system so that he can correct them, whereas the technicians' do not have access to one another's computer files.

Sullivan testified that Service Manager Schumacher works in an office and does not work with tools. Schumacher assigns work both to the technician in charge and to the technicians directly. The technicians negotiate their start time with Schumacher. Schumacher prepares the payroll and approves all requests for time off for both Sullivan and the technicians.

Sullivan does not participate in job interviews for prospective for employees and has never recommended the hire of any employees. Sullivan has never recommended discipline. Sullivan testified that, to his knowledge, no employee has received a written warning since he began working at the facility in 2008. Sullivan has no access to employee personnel files. When an employee was fired last month, Sullivan was not consulted; Sullivan asked Schumacher about the circumstances and was told the matter was confidential. The Employer does not conduct evaluations of the employees at the Marlborough facility. Sullivan testified that Schumacher has never asked him about the abilities of the technicians nor discussed with him whether a technician should get a raise in pay.<sup>10</sup> There is no evidence that Sullivan plays any role in the grievance process; when employees have questions about their pay Sullivan refers them to Schumacher.

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<sup>6</sup> Tikonoff works off-site.

<sup>7</sup> The record does not reveal how many technicians are employed at the Marlborough facility. It appears that Sullivan is the only technician in charge. The record does not reveal the duties of the technician fuelers or lot attendants.

<sup>8</sup> Sullivan is certified by the Automobile Service Excellence program as a master automobile technician, master heavy truck technician, and master school bus technician.

<sup>9</sup> Sullivan works from 6:30 a.m. to 4 p.m., Monday through Friday.

<sup>10</sup> Sullivan testified that there have been no raises that he is aware of. He has not received a raise and does not know if others have received one.

Sullivan is hourly paid and, like all of the other hourly employees, he punches in and out and is paid overtime.<sup>11</sup> Sullivan testified that he assumes he is paid more than the other technicians, but only because of his greater technical expertise. He received a bonus like everyone else last spring. He receives no special privileges or benefits not received by the other technicians. He wears the same uniform as the other technicians, which indicates that his name is “Mike” but does not indicate his title. Sullivan, like the other technicians, is required to provide his own tools, which cost thousands of dollars. Sullivan has attended meetings held for the technicians in charge at various Employer facilities, but these meetings have never included discussions of labor relations matters.

Technician Sean Merchant testified that Sullivan has helped him in a technical fashion, such as troubleshooting a bus repair. No manager has ever told Merchant that Sullivan has any supervisory authority, and Merchant does not view him as a supervisor. Sullivan testified that he was never told during his job interview that he was to have supervisory duties and that he does not consider himself to be a supervisor.

Sullivan substitutes for Schumacher whenever he takes a personal day or a vacation, a week at a time at most. On these occasions, Schumacher gives Sullivan beforehand a list of the buses that need maintenance and who should work on them.

### Analysis

Pursuant to Section 2(11) of the Act, the term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, where the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. To qualify as a supervisor, it is not necessary that an individual possess all of the powers specified in Section 2(11) of the Act. Rather, possession of any one of them is sufficient to confer supervisory status. *Chicago Metallic Corp.*<sup>12</sup>

The burden of proving supervisory status rests on the party alleging that such status exists. *NLRB v. Kentucky River Community Care*.<sup>13</sup> The status of a supervisor under the Act is determined by an individual’s duties, not by his title or job classification. *New Fern Restorium Co.*<sup>14</sup> The Board will refrain from construing supervisory status too

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<sup>11</sup> Schumacher is the only individual at the facility who is exempt from overtime.

<sup>12</sup> 273 NLRB 1677, 1689 (1985).

<sup>13</sup> 532 U.S. 706, 121 S.Ct. 1861, 167 LRRM 2164 (2001).

<sup>14</sup> 175 NLRB 871 (1969).

broadly, because the inevitable consequence of such a construction is to remove individuals from the protection of the Act. *Quadrex Environmental Co.*<sup>15</sup>

The record evidence reveals no evidence that Technician in Charge Sullivan possesses any statutory authority. He plays no role in hiring employees, assigning their work or schedules, disciplining, rewarding employees, or adjusting their grievances, nor is there any evidence that he effectively recommends such actions. Although Sullivan occasionally fills in for Schumacher when he is on vacation, it is well established that an employee who substitutes for a supervisor may be deemed a supervisor only if that individual's exercise of supervisory authority is both regular and substantial. The Board has held that assumption of supervisory duties during vacation periods or other unscheduled occasions is irregular and sporadic and, therefore, insufficient to establish supervisory authority. *Quality Chemical, Inc.*;<sup>16</sup> *Hexacomb Corp.*<sup>17</sup> Further, there is no evidence that Sullivan exercises supervisory authority when he acts as a substitute supervisor, as the work is pre-assigned by Schumacher during those periods.

Accordingly, based upon the foregoing and the stipulations of the parties at the hearing, I find that the following employees of the Employer constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time technicians, technician fuelers, lot attendants, and a technician in charge, employed by the Employer at its 208 Hayes Memorial Drive, Marlborough, Massachusetts facility.

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by International Association of Machinists and Aerospace Workers, District Lodge 15, AFL-CIO. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as

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<sup>15</sup> 308 NLRB 101, 102 (1992).

<sup>16</sup> 324 NLRB 328, 331 (1997).

<sup>17</sup> 313 NLRB 983, 984 (1994).

strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### **Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office on or before **January 21, 2010**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the Regional Office by electronic filing through the Agency's website, [www.nlr.gov](http://www.nlr.gov),<sup>18</sup> by mail, or by facsimile transmission at 617-565-6725. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **two** copies of the list, unless the list is submitted by facsimile or e-mail, in which

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<sup>18</sup> To file the eligibility list electronically, go to [www.nlr.gov](http://www.nlr.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for at least 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by January 28, 2010. The request may be filed electronically through E-Gov on the Agency's website, [www.nlrb.gov](http://www.nlrb.gov),<sup>19</sup> but may not be filed by facsimile.

**DATED:** January 14, 2010

/s/ Ronald S. Cohen

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Ronald S. Cohen, Acting Regional Director  
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<sup>19</sup> To file the request for review electronically, go to [www.nlrb.gov](http://www.nlrb.gov) and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu and follow the detailed instructions. Guidance for E-filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, [www.nlrb.gov](http://www.nlrb.gov).